88-100
No.

In the Supreme Court of the United States

October Term, 1988

Chris Polychron,

Petitioner,

v.

Unites States of America,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Dated: July 15, 1988

QUESTIONS PRESENTED

1A. Whether individual currency transactions less than the amount required to file currency transaction reports may be aggregated to support a criminal indictment based upon the failure to file such reports.

1B. Whether instructions on an Internal Revenue Service form which contradict existing Treasury regulations may be used to support a criminal indictment.

2. Whether the decision of the Eighth Circuit Court of Appeals enlarging a criminal law, coupled with a new administrative interpretation of regulations by the Secretary of the Treasury, violates the Constitution's *ex post facto* clause and the due process clause of the Fifth Amendment to the United States Constitution.

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Chris Polychron petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The Memorandum Opinion of the Honorable Morris S. Arnold, United States District Judge, filed February 19, 1987, is attached hereto as Appendix A (pp. A1 - A10). The Opinion of the Court of Appeals for the Eighth Circuit, filed March 8, 1988, is attached hereto as Appendix B (pp. B1 - B10). The May 20, 1988, denial of Petitioner's Motion for Rehearing and Suggestion for Rehearing En Banc is attached hereto as Appendix C (p. C1).

JURISDICTION

The Judgment of the Court of Appeals for the Eighth Circuit was entered on March 8, 1988. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied on May 20, 1988. This Petition for a Writ of

Certiorari was filed within sixty (60) days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, FEDERAL STATUTES AND REGULATIONS INVOLVED

ARTICLE 1, § 9, cl. 3 of the United States Constitution provides:

> [3.] No bill of attainder or ex post facto law shall be passed.

The Fifth Amendment to the United States Constitution states:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

§ 18 U.S.C. § 371 states:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Pub. L. 91-508 (Oct. 26, 1970), §§ 221-223, 84 Stat. 1122 provided:

> **§ 221. Reports of currency transactions required**
>
> Transactions involving any domestic financial institution shall be reported to the Secretary at such time, in such manner, and in such detail as the Secretary may require if they involve the payment, receipt, or transfer of

United States currency, or such other monetary instruments as the Secretary may specify, in such amounts, denominations, or both, or under such circumstances, as the Secretary shall by regulation prescribe.

§ 222. Persons required to file reports

The report of any transaction required to be reported under this chapter shall be signed or otherwise made both by the domestic financial institution involved and by one or more of the other parties thereto or participants therein, as the Secretary may require. If any party to or participant in the transaction is not an individual acting only for himself, the report shall identify the person or persons on whose behalf the transaction is entered into, and shall be made by the individuals acting as agents or bailees with respect thereto.

§ 223. Reporting procedure

(a) The Secretary may in his discretion designate domestic financial institutions, individually or by class, as agents of the United States to receive reports required under this chapter, except that an institution which is not insured, chartered, examined, or registered as such by any agency of the United States may not be so designated without its consent. The Secretary may suspend or revoke any such designation for any violation of this Act, or section 21 of the Federal Deposit Insurance Act, or section 411 of the National Housing Act.

(b) Any person (other than an institution designated under subsection (a)) required to file a report under this chapter with respect to a transaction with a domestic financial institution shall file the report with that institution, except that (1) if the institution is not designated under subsection (a), the report shall be filed as the Secretary shall prescribe, and (2) any such person may, at his election and in lieu of filing the report in the manner

hereinabove prescribed, file the report with the Secretary. Domestic financial institutions designated under subsection (a) shall transmit reports filed with them, and shall file their own reports, as the Secretary shall prescribe.

31 U.S.C. § 1051 (1970) states:

It is the purpose of this title to require certain reports or records where such reports or records have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

31 U.S.C. § 1052 (1970) states:

(a) The definitions and rules of construction set forth in this section apply for the purposes of this title.

(b) The term "Secretary" means the Secretary of the Treasury.

(c) The term "person" includes natural persons, partnerships, trusts, estates, associations, corporations, and all entities cognizable as legal personalities. The term also includes any governmental department or agency specified by the Secretary either for the purpose of this title generally or any particular requirement thereunder.

(e) The term "financial institution" means any person which does business in any one or more of the following capacities:

(1) an insured bank as defined in section 3 of the Federal Deposit Insurance Act [12 USCS § 1813];

(2) a commercial bank or trust company; . . . .

31 U.S.C. § 1053 (1970) states:

The Secretary shall prescribe such regulations as he may deem appropriate to carry out the purposes of this title.

31 U.S.C. § 1054 (1970) states:

(a) The Secretary shall have the responsibility to assure compliance with the requirements of this title and may delegate such responsibility to the appropriate bank supervisory agency, or other supervisory agency.

(b) The secretary may by regulation require any class of domestic financial institutions to maintain such procedures as he may deem appropriate to assure compliance with the provisions of this title. For the purposes of both civil and criminal penalties for violations of this section, a separate violation shall be deemed to occur with respect to each day and each separate office, branch, or place of business in which the violation occurs or continues.

31 U.S.C. § 1058 (1970) states:

Whoever willfully violates any provision of this title or any regulation under this title shall be fined not more than $1,000, or imprisoned not more than one year, or both.

31 U.S.C. § 1059 (1970) states:

Whoever willfully violates any provision of this title where the violation is—

(1) committed in furtherance of the commission of any other violation of Federal law, or

(2) committed as part of a pattern of illegal activity involving transactions exceeding $100,000 in any twelve-month period,

shall be fined not more than $500,000 or imprisoned not more than five years, or both.

31 U.S.C. § 1062 (1970) states:

Subject to section 203(j) [31 USCS § 1052(j)], the administrative procedure and judicial review provisions of subchapter II of chapter 5 and chapter 7 of title 5, United States Code [5 USCS §§ 551 et seq., 701 et seq.], shall apply to all proceedings under this title.

31 C.F.R. § 103.11 (1972) states:

When used in this part and in forms prescribed under this part, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, terms shall have the meanings ascribed in this section.

Bank. (a) Each agency, branch or office within the United States of any person doing business in one or more of the capacities listed below:

(1) A commercial bank or trust company organized under the laws of any State or of the United States;

(2) A private bank; . . . .

Currency. The coin and currency of the United States or of any other country, which circulate in and are customarily used and accepted as money in the country in which issued. It includes U.S. silver certificates, U.S. notes and Federal Reserve notes, but does not include bank checks or other negotiable instruments not customarily accepted as money.

Financial institution. Each agency, branch, or office within the United States of any person doing business in one or more of the capacities listed below:

(1) A bank (except bank credit card systems); . . . .

* * * *

Monetary instruments. Coin or currency of the United States or of any other country, travelers' checks, money orders, investment securities in bearer form or otherwise in such form that title thereto passes upon delivery, and negotiable instruments (except warehouse receipts or bills of lading) in bearer form or otherwise in such form that title thereto passes upon delivery. The term includes bank checks, travelers' checks and money orders which are signed but on which the name of the payee has been omitted, but does not include bank checks, travelers' checks or money orders made payable to the order of a named person which have not been endorsed or which bear restrictive endorsements.

Person. An individual, a corporation, a partnership, a trust or estate, a joint stock company, an association, a syndicate, joint venture, or other unincorporated organization or group, and all entities cognizable as legal personalities.

Transaction in currency. A transaction involving the physical transfer of currency from one person to another. A transaction which is a transfer of funds by means of bank check, bank draft, wire transfer, or other written order, and which does not include the physical transfer of currency is not a transaction in currency within the meaning of this part.

31 C.F.R. § 103.21 and 22 (1972) states:

§ 103.21 Determination by the Secretary.

The Secretary hereby determines that the reports required by this subpart have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

§ 103.22 Reports of currency transactions.

(a) Each financial institution shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a transaction in currency of more than $10,000.

Such reports shall be made on forms prescribed by the Secretary and all information called for in the forms shall be furnished.

Overall responsibility for coordinating the procedures and effects of the agencies listed herein and assure that compliance with this part is delegated to the Assistant Secretary (Enforcement and Operations). Periodic reports shall be made by each such agency to the Assistant Secretary (Enforcement and Operations), with copies to the General Counsel of the Treasury and to the Commissioner of Internal Revenue.

31 C.F.R. § 103.49 (1972) states:

(a) Any person who willfully violates any provision of this part may, upon conviction thereof, be fined not more than $1,000 or be imprisoned not more than 1 year, or both. Such person may in addition, if the violation is of any provision authorized by title I of Pub. L. 91-508 and if the violation is committed in furtherance of the commission of any violation of Federal law punishable by imprisonment for more than 1 year, be fined not more than $10,000 or be imprisoned not more than 5 years, or both.

(b) Any person who willfully violates any provision of title II of Pub. L. 91-508, or of this part authorized thereby, where the violation is either

(1) Committed in furtherance of the commission of any other violation of Federal law, or

(2) Committed as part of a pattern of illegal activity involving transactions exceeding $100,000 in any 12-month period, may, upon conviction thereof, be fined not more than $500,000 or be imprisoned not more than 5 years, or both.

(c) Any person who knowingly makes any false, fictitious or fraudulent statement or representation in any

report required by this part may, upon conviction thereof, be fined not more than $10,000 or be imprisoned not more than 5 years, or both.

Proposed Amendments of regulations published in the Federal Register on August 25, 1986 provided:

DEPARTMENT OF THE TREASURY

31 CFR, Part 103

Amendments to Implementing Regulations; the Bank Secrecy Act

AGENCY: Office of the Secretary, Treasury.

ACTION: Proposed rule.

SUMMARY: The Bank Secrecy Act, Pub. L. No. 91-508 (permanently codified at 12 U.S.C. 1829b, 12 U.S.C. 1951 *et seq.* and at 31 U.S.C. 5311 *et seq.*), empowers the Secretary of the Treasury to require financial institutions to keep records and file reports that the Secretary determines have a high degree of usefulness in criminal, tax and regulatory matters. At present, Treasury regulations implementing the Act require a variety of financial institutions to file reports of large currency transactions. The Secretary also can direct designated institutions to file reports regarding specified transactions with foreign financial agencies. Financial institutions also are required to maintain records necessary to trace transactions through the nation's banking system.

The Department's experience in enforcing the Act in recent years has indicated that the following proposed substantive regulatory changes are needed to strengthen enforcement of the Act. In particular, recent judicial decisions, such as *United States v. Anazalone*, 766 F.2d 676 (1st Cir. 1985), have drawn attention to the fact that the

regulations may be inadequate to sustain prosecutions for failing to report transactions that have been structured to evade the current reporting requirements. In light of cases such as *Anzalone*, the Department of Justice believes that certain changes to the currency transaction reporting requirements are needed to expand the coverage of the Act to ensure the collection of needed information, and to strengthen enforcement of the Act.

DATE: Comments must be received on or before November 24, 1986.

ADDRESS: Address written comments to Jonathan J. Rusch, Acting Director, Office of Financial Enforcement, Office of the Assistant Secretary (Enforcement), Department of the Treasury, Room 1458, 1500 Pennsylvania Ave., NW., Washington, DC 20220.

for further information contact;

Linda Noonan, Attorney Advisor, Office of the Assistant General Counsel (Enforcement), Department of the Treasury, Room 2000, 1500 Pennsylvania Ave., NW., Washington, DC 20220 (202/566-2941).

SUPPLEMENTARY INFORMATION:

Background

The following amendments are made to strengthen enforcement of the Bank Secrecy Act and to make clarifications to the existing regulations, as noted:

* * * *

(6) *Add a new definition for "business day."* This amendment provides that the term "business day" for banks means banking day. See regulatory proposal #2.

(7) *Clarify that financial institutions must report multiple, same-day currency transactions of which they are aware that total more than $10,000:* This amendment codifies the CTR Form 4789 instruction that currently requires financial institutions to report multiple, same-day transactions of which they are aware that are by or on behalf of any person and total more than $10,000. It does not impose any new burden on financial institutions to adopt systems to reveal the existence of multiple, same-day transactions. See regulatory proposal #4.

* * * *

Amendment

It is proposed to amend 31 CFR Part 103 as set forth below:

PART 103—[AMENDED]

1. The authority citation for Part 103 is revised to read as follows:

Authority: Sec. 21 of the Federal Deposit Insurance Act, Pub. L. 91-508, Title I, 84 Stat. 1114-1116 (12 U.S.C. 1829b, 1951-9); and the Currency and Foreign Transactions Reporting Act. Pub. L. No. 91-508, Title II, 84 Stat. 1118, as amended (31 U.S.C. 5311-23).

2. It is proposed to revise § 103.11 to read as follows:

§ 103.11 Meaning of terms.

When used in this part and in forms prescribed under this part, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, terms shall have the meanings ascribed in this section.

(a) *Bank.* Each agent, agency, branch or office within the United States of any person doing business in one or more of the capacities listed below:

(1) A commercial bank or trust company organized under the laws of any State or of the United States;

(2) A private bank; . . . .

* * * *

(n) *Transaction in currency.* A transaction involving the physical transfer of currency from one person to another. A transaction which is a transfer of funds by means of bank check, bank draft, wire transfer, or other written order, and which does not include the physical transfer of currency is not a transaction in currency within the meaning of this part.

* * * *

(p) *Business day.* Business day, as used in this Part with respect to banks, means banking day.

* * * *

4. It is proposed to revise § 103.22 to read as follows:

§ 103.22 Reports of currency transactions.

(a)(1) Each financial institution other than a casino shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution which involves a transaction in currency of more than $10,000. Multiple currency transactions shall be treated as a single transaction if the financial institution is aware that they are by or on behalf of any person and result in either cash or in cash out totalling more than $10,000 during any one business day. Deposits

made at night or over a weekend or holiday shall be treated as if received on the next business day following the deposit.

* * * *

31 C.F.R. § 103.11 (1987) states:

When used in this part and in forms prescribed under this part, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, terms shall have the meanings ascribed in this section.

(a) *Bank.* Each agent, agency, branch or office within the United States of any person doing business in one or more of the capacities listed below:

1. A commercial bank or trust company organized under the laws of any State or of the United States;

(2) A private bank; . . . .

* * * *

(d) *Currency.* The coin and paper money of the United States or of any other country that is designated as legal tender and that circulates and is customarily used and accepted as a medium of exchange in the country of issuance. Currency includes U.S. silver certificates, U.S. notes and Federal Reserve notes. Currency also includes official foreign bank notes that are customarily used and accepted as a medium of exchange in a foreign country.

(g) *Financial institution.* Each agent, agency, branch, or office within the United States of any person doing business, whether or not on a regular basis or as an organized business concern, in one or more of the capacities listed below;

(1) A bank (except bank credit card systems); . . . .

(k) *Monetary instruments.* (1) Monetary instruments include:

(i) Currency; . . . .

* * * *

(l) *Person.* An individual, a corporation, a partnership, a trust or estate, a joint stock company, an association, a syndicate, joint venture, or other unincorporated organization or group, and all entities cognizable as legal personalities.

(o) *Transaction in currency.* A transaction involving the physical transfer of currency from one person to another. A transaction which is a transfer of funds by means of bank check, bank draft, wire transfer, or other written order, and which does not include the physical transfer of currency is not a transaction in currency within the meaning of this part.

(q) *Business day.* Business day, as used in this part with respect to banks, means that day, as normally communicated to its depository customers, on which a bank routinely posts a particular transaction to its customer's account.

31 C.F.R. §§ 103.21 and .22 (1967) state:

§ 103.21.

The Secretary hereby determines that the reports required by this subpart have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

§ 103.22

(a)(1) Each financial institution other than a casino shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution which involves a transaction in currency of more than $10,000. Multiple currency transactions shall be treated as a single transaction if the financial institution has knowledge that they are by or on behalf of any person and result in either cash in or cash out totalling more than $10,000 during any one business day. Deposits made at night or over a weekend or holiday shall be treated as if received on the next business day following the deposit.

31 C.F.R. § 103.49 (1987) states:

(a) Any person who willfully violates any provision of title I of Pub. L. 91-508, or of this part authorized thereby may, upon conviction thereof, be fined not more than $1,000 or be imprisoned not more than 1 year, or both. Such person may in addition, if the violation is of any provision authorized by Title I of Pub. L. 91-508 and if the violation is committed in furtherance of the commission of any violation of Federal law punishable by imprisonment for more than 1 year, be fined not more than $10,000 or be imprisoned not more than 5 years, or both.

(b) Any person who willfully violates any provision of title II of Pub. L. 91-508, or of this part authorized thereby, may, upon conviction thereof, be fined not more than $250,000 or be imprisoned not more than 5 years, or both.

(c) Any person who willfully violates any provision of title II of Pub. L. 91-508, or of this part authorized thereby, where the violation is either:

(1) Committed in furtherance of the commission of any other violation of Federal law, or

(2) Committed as part of a pattern of illegal activity involving transactions exceeding $100,000 in any 12-month period, may, upon conviction thereof, be fined not more than $500,000 or be imprisoned not more than 5 years, or both.

(d) Any person who knowingly makes any false, fictitious or fraudulent statement or representation in any report required by this part may, upon conviction thereof, be fined not more than $10,000 or be imprisoned not more than 5 years, or both.

31 C.F.R. § 103.53 (1987) states:

No person shall for the purpose of evading the reporting requirements of § 103.22 with respect to such transaction:

(a) Cause or attempt to cause a domestic financial institution to fail to file a report required under § 103.22;

(b) Cause or attempt to cause a domestic financial institution to file a report required under § 103.22 that contains a material omission or misstatement of fact; or

(c) Structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

STATEMENT OF THE CASE

The Indictment in this case [1] accused Polychron of violating the provisions of 18 U.S.C. §§ 2, 371 and 1001 as well as 31 U.S.C. §§ 5313 (formerly § 1081) and § 5322. Polychron was president of the Grand National Bank in Hot Springs, Arkansas. According to the indictment, between 1979 and 1982, Polychron and a depositor (who was alleged to be an unindicted co-conspirator) willfully conspired to defraud the United States by impairing, obstructing and defeating lawful government functions relating to the filing of Currency Transaction Reports (Internal Revenue Service Form 4789, [2] herein referred to as CTR). [3]

The indictment alleged that Polychron caused currency to be deposited to an account at the Grand National Bank between 1979 and 1980; and that from about February 9, 1982 to about March 12, 1982, Polychron withdrew or caused the withdrawal of United States currency "in increments of less than $10,000.00" from the account—"thus causing no accurate currency transaction report to be filed with the Secretary of the Department of Treasury as required by law." [4]

In the "Overt Acts" section, [5] the indictment alleges that the unindicted depositor opened an account at the Grand National Bank on or about May 29, 1979 (under the

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1. Appendix D (pp. D1 – D9).

2. Appendix E (p. E1).

3. Appendix D (p. D3).

4. Appendix D (pp. D3 - D4).

5. Appendix D (pp. D4 - D5).

name of "William Spaniol"); that the depositor caused to be deposited proceeds from the maturation of a certificate of deposit in the name of "William Spaniol" into that account; that the depositor instructed Polychron to withdraw a total of more than $140,000.00 from his savings account; that the depositor provided Polychron with signed withdrawal slips in order for the sum to be withdrawn from the savings account; that from on or about February, 1982, Polychron instructed employees at the Grand National Bank to make withdrawals of currency from the savings account in amounts of "less than $10,000.00 until the account was depleted;" and that in accordance with Polychron's instructions, currency was withdrawn from the savings account as follows:

DATE OF WITHDRAWAL	AMOUNT WITHDRAWN
February 9, 1982	$ 9,100
February 11, 1982	9,450
February 16, 1982	8,500
February 17, 1982	9,700
February 18, 1982	9,800
February 19, 1982	9,200
February 25, 1982	9,800
February 26, 1982	9,900
March 5, 1982	9,500
March 9, 1982	9,400
March 9, 1982	9,700
March 10, 1982	9,900
March 11, 1982	6,837
March 11, 1982	9,900
March 12, 1982	9,900
TOTAL	$140,587

The foregoing amounts represent the actual withdrawals from the account and were specifically listed in the indictment and the Court of Appeals' opinion as the basis for the criminal charges against Polychron.

The indictment further alleged that no CTR for "these cash withdrawals were made".[6] Although Counts II through V of the indictment charged violations of 18 U.S.C. § 2 [7], 31 U.S.C. 5313, 31 U.S.C. 5322, and 18 U.S.C. § 1001, [8] the basis for all charges was that the Grand National Bank had not filed a CTR for any of the withdrawals listed.

The government contended that the indictment was sufficient since it charged Polychron with causing the failure to file CTR's for what were alleged to be transactions in excess of $10,000.00 and with concealing material facts from the Department of Treasury in regard to those transactions. The government further contended that Polychron had been charged with various "money laundering" violations for the alleged concealment of the identity of the unindicted depositor as the true source and

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6.
Appendix D (p. D5).

7.
18 U.S.C. § 2 (1951) states:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

8.
18 U.S.C. § 1001 (1948) states:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

owner of more than $140,000.00 of currency from the Department of Treasury.

According to the government, the cash withdrawals were "made to appear" as if they were individual cash withdrawals of under $10,000.00 in an attempt to avoid the currency transaction reporting requirements. Since on two days (there is no indication whether the reference is to two banking days or calendar days) withdrawals from the account totaled more than $10,000 (although no individual withdrawal exceeded that amount), the government contended that CTR's should have been filed for what it contended to be "multiple transactions."

CTR's were required to be filed in accordance with regulations promulgated by the Secretary of Treasury. [9] Briefly, financial institutions were required to complete and file a CTR for each "transaction" involving currency in excess of ten thousand dollars. The regulations [10] provided that:

> Each financial institution shall file a report of each *deposit, withdrawal, exchange of currency or other payment or transfer,* by, through, or to such financial institution, which involves a ***transaction*** *in currency of more than $10,000.* * * * (emphasis added)

A "transaction in currency" which invoked the CTR filing requirements was clearly defined in the regulations as "a transaction involving the physical transfer of currency from one person to another." [11]

9.
31 U.S.C. § 5313, supra.

10.
31 C.F.R. § 103.22(a), supra.

REASONS FOR GRANTING THE WRIT

This case presents critical questions upon which there is a split of authority within the Circuits and concerning the *ex post facto* and due process clauses of the United States Constitution.

1. The Decision Below Presents Two Questions In Which There Is A Split Of Authority In The Circuits.

A. MAY INDIVIDUAL TRANSACTIONS LESS THAN THE AMOUNT REQUIRED TO FILE CURRENCY TRANSACTION REPORTS BE AGGREGATED TO SUPPORT A CRIMINAL INDICTMENT BASED UPON THE FAILURE TO FILE SUCH REPORTS.

The crux of the Indictment was that Polychron structured currency transactions to avoid the reporting requirements. The criminal charges were based upon the false notion that citizens are required to "structure" their transactions so as to come within the reporting requirements.

The First Circuit held that the regulations did not prohibit "structured" transactions in *United States v. Anzalone*, 766 F.2d 676 (1st Cir. 1985). In *Anzalone* the Court stated:

> We come next to the "structured" transaction issue. We find nothing on the face of either the Reporting Act, or its regulations, or in their legislative history, to support the proposition that a "structured transaction" by a customer constitutes an illegal evasion of any reporting duty of that customer.
>
> We need not go far to sustain this contention. The government itself has admitted to so much, though concededly through a branch other than the justice department. We refer to a report to Congress by the

> Comptroller General of the United States entitled "Bank Secrecy Act – Reporting Requirements Have Not Yet Met Expectations, Suggesting Need For Amendment," G.G.D.-81-80, dated July 23, 1981. The report discussed the deficiencies in the regulation on this issue, noting that "the regulations were silent on the propriety of a customer's conducting multiple transactions to avoid reporting." Id. at 23. Under the heading "Failure to Prohibit Splitting Transactions Allowed to Circumvent reporting requirements," Id at 24, the report indicates:
>
> "Similarly, although the regulations required reporting for each single transaction above $10,000.00, they did not specifically prohibit dividing a large transaction into several smaller transactions to circumvent the reporting requirement . . ." *United States v. Anzalone*, supra at 681.

It is significant to note that the "currency" involved in the instant case did not exist until after the individual withdrawals were made. The applicable funds, as noted in the indictment against Polychron, were on deposit in a bank account until removed by the individual withdrawals, none of which exceeded the threshold amount of ten thousand dollars. "Currency" is specifically defined in the regulations to include only the "coin and currency of the United States or of any other country which circulate in and are customarily used and accepted as money." Funds on deposit in an existing account do not constitute "currency."

The Secretary could easily have promulgated regulations which prohibited the so-called multiple transactions. This is abundantly clear by the regulations which were eventually adopted in 1987.

Additional amendments to the Bank Secrecy Act Regulations proposed by the Secretary, after the opinion in this case was issued, are now pending. 53 Fed. Reg. 23, 289 (1988) (to be codified at 31 C.F.R. pt 103), proposed June 21, 1988, state, in pertinent part:

Summary: Two amendments are being proposed to the Bank Secrecy Act Regulations, 31 C.F.R. Part 103. The first proposal would amend 31 C.F.R. 103.27 to clarify that a person conducting currency transactions for another person must report on the currency Transaction Report (Form 4789) the name of the person on whose behalf the transaction was conducted. The second proposal would add a definition of "structuring" to the anti-structuring provision of 31 C.F.R. 103.53 which prohibits a person from structuring or assisting in structuring, or attempting to structure or assist in structuring, any transaction with one or more domestic financial institutions for the purpose of evading the reporting requirements.

* * *

The second proposal deals with the "anti-structuring" provision, 31 U.S.C. 5324, which prohibits any person from structuring or assisting in structuring, or attempting to structure or assist in structuring, transactions "for the purpose of evading" the currency transaction reporting requirements. The "anti-structuring" provision was added by the Money Laundering Control Act, Subtitle H of the Anti-Drug Abuse Act of 1986, Pub. L. 99-570 (October 27, 1986). It also prohibits a person, for the same purpose, from causing or attempting to cause a financial institution to fail to file a Form 4789 or to file a report that contains a material omission or misstatement of fact.

The enactment of Section 5324 clarified that all currency transaction structuring schemes designed to evade the reporting requirements, regardless of whether the $10,000 threshold is met at a single financial institution on a single day, are unlawful. See H.R. Rep. No. 746, 99th Cong., 2d Sess. 18-20 (1986); S. Rep. No. 433, 99th Cong., 2d Sess. 21-22 (1986).

* * *

Since the structuring provision was enacted in 1987, there has been some concern by financial institutions that neither the statute itself nor the regulation gives a formal definition of "structure" or "structuring." In order to deal with these concerns, Treasury is proposing a definition of "structure" or "structuring" for inclusion in the Bank Secrecy Act regulations. The definition was devised in consultation with the Internal Revenue Service Criminal Investigation Division and the Justice Department. The definition provides that a person structures a transaction if: (1) acting alone, or in conjunction with, or on behalf of, other persons; (2) he conducts, attempts to conduct or assists in conducting; (3) one or more transactions in currency; (4) in any amount; (5) at one or more financial institutions; (6) on one or more days; (7) in any manner; (8) for the purpose of evading the reporting requirements of 31 C.F.R. 103.22 the phrase "in any manner" is defined to include, but is not limited to, all schemes involving the breaking down of sums of currency larger than $10,000 into smaller sums including sums at or below $10,000, or through the conducting of a series of related currency transactions at or below $10,000 at one financial institution or multiple financial institutions on one or more days. The definition also states that "[t]he transaction or transactions need not exceed the $10,000 reporting threshold at any single financial institution on any single day in order to constitute structuring within the meaning of this definition." This makes it clear that structuring is not limited to multiple transactions done on the same day at a single financial institution.

* * *

(n) Structure (structuring). For purposes of §103.53, a person structures a transaction if that person, acting alone, or in conjunction with, or on behalf of, other persons, conducts or attempts to conduct one or more transactions in currency, in any amount, at one or more financial institutions, on one or more days, in any manner, for the purpose of evading the reporting requirements under

§103.22 of this part. "In any manner" includes, but is not to, the breaking down of a single sum of currency exceeding $10,000 into smaller sums, including sums at or below $10,000; or the conduct of a transaction, or series of currency transactions, including transactions at or below $10,000. The transaction or transactions need not exceed the $10,000 reporting threshold at any single financial institution on any single day in order to constitute structuring within the meaning of this definition.

Nonetheless, the regulations in effect at the time of the withdrawals in this case required that CTR's be filed only for a "transaction in currency" which exceeded ten thousand dollars.

At the time the regulations were promulgated, the Secretary obviously realized that a lower level for filing would create an undue administrative burden and consciously chose a cutoff point below which no interest by the government would arise.

For some inexplicable reason, however, the Court of Appeals assumed that anyone with more than $10,000 on deposit in an existing account had to withdraw the funds in increments greater than $10,000. Presumably, *any* withdrawal from an account is "structured" in the sense that a depositor has the right to decide how much to withdraw at any one time. The Court of Appeals specifically held:

> ". . . the Reporting Act sufficiently apprised Polychron that when a financial institution or its officer or employee acting within the scope of his employment structues *an otherwise reportable transaction* into multiple transactions in a single day that do not individually exceed $10,000, the bank or its officer or employee may be held criminally responsible for failing to file or causing the bank to fail to file, a CTR. To hold contrary would be to eviscerate the intent of Congress and the meaning of the Reporting Act. (emphasis added)

The Court of Appeals' assumption that "an otherwise reportable transaction" existed runs contrary to the clear wording of the regulations. Here, the Court of Appeals created a nonexistent larger transaction and authorized the prosecution of Polychron for illegally dividing that fictitious transaction into smaller transactions to avoid the reporting requirements. A thorough review of the indictment clearly reflects that no such larger "transaction" ever existed.

The Court of Appeals' decision squarely conflicts with rulings in the Seventh Circuit. See, *United States v. Gimbel*, 830 F.2d 621 (7th Cir. 1987) and *United States v. Risk*, 843 F.2d 1059 (7th Cir. 1988).

In *Risk*, the Seventh Circuit held:

> The dispositive question in *Gimbel*, as here, was whether the CTR statute "imposed a duty" on the bank to report the structured transactions. After thoroughly reviewing the conflicting decisions of the various circuits and their rationales, we found the bank had no duty and reversed Gimbel's conviction. We concluded that the bank had no legal duty to report the structured transaction because neither the statute nor the Secretary of the Treasury's regulations expressly require the aggregation of multiple transactions over $10,000 occurring on the same day. As we stated in *Gimbel*, "the essential characteristic of a structured transaction is that the customer effects several discrete 'physical transfer[s] of currency.' The original [Treasury] regulations gave no hint that financial institutions were required to assess the economic reality behind these acts." *Id.*, at 625 (citations omitted). *United States v. Risk*, supra at p. 1062.

1.B. CAN INSTRUCTIONS ON THE BACK OF AN INTERNAL REVENUE SERVICE FORM WHICH CONTRADICT EXISTING TREASURY REGULATIONS BE USED TO SUPPORT A CRIMINAL INDICTMENT.

The regulations in effect at the time of the withdrawals at issue required the filing of a CTR for any deposit, withdrawal, exchange of currency or other payment or transfer [12] which involved a "transaction in currency" of more than $10,000.

The indictment against Polychron fails to allege any "transaction in currency" in excess of $10,000 in which Polychron or the bank allegedly engaged. To the contrary, the indictment specifically referenced the transactions at issue and none of them exceeded the threshold amount.

If there was no "transaction in currency" of an amount in excess of $10,000, there was no requirement to file a CTR. Therefore, Polychron could not have failed to file a report, caused the failure to file a report, or in any manner defrauded the United States. One cannot conceal that which was never required to be disclosed.

By the clear wording of the regulations and the indictment, the individual withdrawals were the "transactions in currency" upon which the indictment was based. Since none of the "transactions in currency" exceeded the requisite amount for filing, the government aggregated the withdrawals occurring on the same day [13] and alleged that those withdrawals, once combined, invoked the filing requirements. Having so combined the "transactions in currency" to meet the filing requirements, the government indicted Polychron for causing the failure to file CTR's for the combined transactions.

The authority upon which the government relied in combining individual "transactions in currency" into an imaginary single transaction came from language contained in the instructions on the back of the CTR form. [14] The Court of

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12.
31 C.F.R. § 103.22(a).

13.
Whether a banking day or calendar day was used was not specified.

14.
Appendix E (p. E1).

Appeals, in turn, adopted those instructions and specifically cited them as follows:

> For the purpose of filing the currency transaction reports, the Department of Treasury issued Form 4789 which stated that "[m]ultiple transactions by or for any person which in any one day total more than $10,000 should be treated as a single transaction, if the financial institution is aware of them.

The Court of Appeals' reliance upon the instructions contained on the back of an Internal Revenue Service form to support the criminal charges against Polychron directly conflicts with the Ninth Circuit's ruling in *United States v. Reinis*, 794 F.2d 506 (9th Cir. 1986).

In *Reinis*, a customer was convicted for an alleged money laundering operation. The government contended that the bank should have filed CTR's because Reinis purchased several cashier's checks on the same day which all totalled more than ten thousand dollars, although no single check exceeded that amount. The Ninth Circuit reversed Reinis' conviction noting that there was no regulation which required the filing of a report for multiple transactions. The government argued, as it did in the instant case, that the instructions on the Internal Revenue Service form referencing the filing of a CTR where multiple transactions totalled more than ten thousand dollars in a single day created a duty for the bank to file the form. The Ninth Circuit held:

> The government contends that instructions in the Currency Transaction Reporting Form, Form 4789—"Multiple transactions by or for any person which in any one day total more than $10,000 should be treated as a single transaction, if the financial institution is aware of them"—required the bank to treat these multiple transactions as a single transaction and to report them. Form 4789, however, was never promulgated pursuant to the rule making requirements

> of the Administrative Procedure Act, 5 U.S.C. § 553. *United States v. Richter*, 610 F.Supp. 480, 489 cert. den. 107 S.Ct. 191 and n. 14 (D.C. Ill. 1985). Consequently, Form 4789 is not effective as a regulation. See *United States v. $200,000 in United States Currency*, 590 F.Supp. 866 (S.D. Fla. 1984). Criminal penalties for failure to report currency transactions can attach only upon violation of regulations promulgated by the Secretary. See *California Bankers Association v. Shultz*, 416 U.S. 21, 26 (1974). As the bank did not violate the law by failing to treat multiple transactions on the same day as a single transaction, Reinis cannot have been guilty of any of the offenses for which he was charged. *United State v. Reinis*, 794 F.2d 506, 508 (9th Cir. 1986).

The holding in *Reinis*, supra, has also been followed in the Seventh Circuit. In *United States v. Gimbel*, 830 F.2d 621 (7th Cir. 1987) the Court held:

> Prior to April, 1987, the only reference by the Treasury Department to aggregation was contained in Form 4789. However, as the Ninth Circuit recognized, Form 4789 was not promulgated in accordance with the procedures set forth in § 553 of the Administrative Procedure Act. See *United States v. Reinis*, 794 F.2d 506 (9th Cir. 1986). Therefore, the directions contained on the form constitute nothing more than interpretive rules. See *Production Tool Corporation v. Employment and Training Administration*, 688 F.2d 1161, 1164 (7th Cir. 1983). Although such rules may sometimes be persuasive evidence of the requirements of the statute pursuant to which they were promulgated, they do not themselves have the force of law, and therefore cannot impose a legal duty. *Id.* (*Gimbel*, supra at page 626. See also, *United States v. Risk*, supra.)

On two of the days listed in the indictment against Polychron, more than one withdrawal was made from the account, each of which was less than $10,000, but, when combined by date of withdrawal, aggregated more in a

single day. The Court of Appeals held that the withdrawals could be grouped as "multiple transactions" giving rise to a duty to file CTR's and thereby forming a basis for the indictment.

Not only is the Court of Appeals' reliance upon instructions on an Internal Revenue Service form (in lieu of following the clearly stated regulations) in direct conflict with the Ninth Circuit's holding and the statutes outlining procedures for promulgating regulations, it also conflicts with the general rule followed in virtually every circuit that Internal Revenue Service forms do not constitute the law. The government has, on numerous occasions, argued against taxpayers in civil cases who alleged reliance upon Internal Revenue Service instructions or forms, and the Courts have uniformly held that the regulations control, not the forms. The Court of Appeal's reliance upon an Internal Revenue Service form which incorrectly stated the filing requirements, and the government's use of that form to prosecute Polychron creates a dangerous precedent indeed.

2. THE JUDICIAL DECISION OF THE EIGHTH CIRCUIT COIURT OF APPEALS ENLARGING A CRIMINAL LAW, COUPLED WITH A NEW ADMINISTRATIVE INTERPRETATION OF REGULATIONS BY THE SECRETARY OF THE TREASURY, VIOLATES THE CONSTITUTION'S *EX POST FACTO* CLAUSE, ART. I, § 9, cl. 3, AND THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Constitution prevents Congress from passing any "ex post facto law." Art. I, § 9, cl. 3.

In *Dobbert v. Florida*, 432 U.S. 282, 292, 97 S.Ct. 2290, 53 L.Ed.2d 344 reh. den. 434 U.S. 882 (1977) this Court stated:

> It is well settled, by decisions of this Court, so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done; . . . or which deprives one charged with a crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*.

Moreover, when Congress has delegated "the authority to make a rule instead of making the rule itself," the resulting rule becomes an extension of the statute for purposes of the clause. *Rodriguez v. United States Parole Commission*, 594 F.2d 170, 173 (7th Cir. 1979).

In addition, a new administrative interpretation of a rule may fall within the scope of the clause, *Lindsey v. Washington*, 301 U.S. 397, 57 S.Ct. 797, 81 L.Ed. 1182 (1937), or a court decision which constitutes an "unforeseeable and retroactive judicial expansion of narrow and precise statutory language," may be found to operate precisely like an *ex post facto* law, *Bouie v. City of Columbia*, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964), since each "alters the situation of (an) accused to his disadvantage . . . ." *In re Medley*, 134 U.S. 160, 171, 10 S.Ct. 384, 387, 33 L.Ed. 835 (1890).

The decision of the Eighth Circuit Court of Appeals, in reversing the district court, amounts to the retroactive application of 31 C.F.R. § 103.22(a)(1) (1987) which provides that "multiple currency transactions shall be treated as a single transaction if the financial institution has knowledge that they are by or on behalf of any person and result in either cash in or cash out totalling more than $10,000.00 during any one business day."

31 C.F.R. § 103.11(e) states "business day," as used with respect to banks, "means that day, as normally communicated to its depository customers, on which a bank routinely posts a particular transaction to its customer's account."

The Eighth Circuit Court of Appeals, in holding that the reporting act sufficiently apprised Polychron of the multiple transaction rule, enlarged clear and unambiguous statutes and rules in violation of Polychron's right to fair warning as required by the due process clause and *ex post facto* clause of the Constitution. See *Bouie v. City of Columbia*, supra, 378 U.S. 350-355 at 84 S.Ct. 1701-1703.

The clear intent of the *ex post facto* prohibition was to provide "that legislative acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." *Weaver v. Graham*, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981).

From the comments included within the amendments to 31 C.F.R. § 103.22(a)(1) (1987) the Secretary intended to convey that the new regulation was merely a "clarification" of the regulation in effect during the dates alleged in Polychron's indictment (May, 1979, to March, 1982). The Eighth Circuit Court of Appeals relied upon the changed regulation, as well as an uncodified Treasury form, to support its decision that the allegations in Polychron's indictment constituted a criminal offense.

Since the regulations and judicial decision have the force and effect of law, and since the regulations and judicial decision attempt to punish as a crime an act previously committed (which was innocent when done), Polychron and many other citizens of the Eighth Circuit are now exposed to prosecution for alleged crimes committed prior to 1987 and are deprived of a defense available to them when their act was committed. The ultimate result is to alter an accused's situation to his disadvantage which is prohibited by the Constitution.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: July 15, 1988

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
HOT SPRINGS DIVISION
(Filed February 19, 1987)

UNITED STATES OF AMERICA,	)	
	)	
PLAINTIFF	)	
	)	
vs.	)	CR-86-60016-01
	)	
CHRIS POLYCHRON,	)	
	)	
DEFENDANT	)	

MEMORANDUM OPINION

The indictment against the defendant Chris Polychron alleges that he, as President of the Grand National Bank of Hot Springs, Arkansas, failed to file currency transaction reports (CTR's) or caused them not to be filed, and that he conspired to violate the currency transaction reporting statutes and regulations which require the filing of such reports. In Count 1 defendant is charged with violating 18 U.S.C. § 371 by conspiring with the bank's customer William R. Anderson to defraud the United States in the collection of data and reports of currency in excess of $10,000. The alleged purpose of Polychron's conduct, the indictment claims, was to conceal the identity of Anderson as the true source and owner of more than $140,000 of United States currency from the Department of the Treasury. The government charges that Polychron accomplished this scheme to defraud by helping Anderson withdraw the entire balance of the account in serial cash withdrawals of under $10,000 in an attempt to avoid the currency transaction reporting requirements of 31 U.S.C. § 5313. Counts 2 and 3, which charge defendant with failing to file

CTR's, or causing them not to be filed, in violation of 31 U.S.C. §§ 5313 and 5322, [1] and 18 U.S.C. § 2, are based on the contention that defendant's attempt to avoid this reporting requirement failed on two specific withdrawal days—March 9 and March 11—because the total amount transacted on each of those dates exceeded $10,000. Counts 4 and 5 charge defendant with scheming to conceal a material fact from the Secretary of the Treasury, to wit, the true nature of the split "transactions in currency" on March 9 and March 11, 1982, in violation of 18 U.S.C. §§ 1001 and 2. Defendant moves to have all charges in this indictment dismissed.

I.

The court will first examine the question of whether Counts 2 and 3 state the crime of failing to file CTR's, or causing them not to be filed, in violation of 31 U.S.C. § 5313 and 18 U.S.C. § 2. 31 U.S.C. § 5313 [2] requires CTR's to be filed in accordance with regulations promulgated by the Secretary of Treasury. According to 31 C.F.R. § 103.22(a), which was promulgated pursuant to the statute, "each financial institution shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which

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31 U.S.C. § 5322 sets forth the criminal penalties for a person willfully violating 31 U.S.C. §§ 5311 *et seq.* or a regulation prescribed under it.

2

The pertinent part of this section provides:

(a) When a domestic financial institution is involved in a transaction for the payment, receipt or transfer of United States coins or currency (or other monetary instruments the Secretary of the Treasury prescribes), in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes. A participant acting for another person shall make the report as the agent or bailee of the person and identify the person for whom the transaction is being made.

involves a transaction in currency of more than $10,000." Defendant is not a financial institution and therefore could not directly violate 31 U.S.C. § 5313. He could, however, be guilty under 18 U.S.C. § 2 [3] if he willfully caused a bank to violate § 5313. *United States v. Heyman*, 794 F.2d 788 (2nd Cir. 1986); *United States v. Cook*, 745 F.2d 1311 (10th Cir. 1984), *cert. denied*, 469 U.S. 1220 (1985). Of course, the efficacy of such a charge depends upon the existence of a duty in the bank to file a CTR for the alleged transaction or transactions. Without such a duty, the bank could not have violated the law by not filing.

All of the pertinent "transactions" were listed in the indictment. None of the scheduled withdrawals involved a transaction in excess of $10,000.00. As noted earlier, CTR's are to be filed for any "deposit," "withdrawal," "exchange," "payment," or "transfer" which involves a "transaction" of more than $10,000.00 in currency. Neither the "possession" nor the "accumulation" of currency triggers the requirement to file any CTR. Therefore, it would appear that the bank had no duty to file any CTR for the activities in question, and thus defendant could not have caused the bank to violate § 5313 by causing it to fail to file.

The United States argues, nevertheless, that a duty to file a CTR existed because single-day transactions must be aggregated, and such aggregates exceeded $10,000 on both March 9 and March 11. Though neither the statute nor regulations issued under it require the aggregation of

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3 18 U.S.C. § 2 provides:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

single-day transactions, the Currency Reporting Form itself (Form 4789) provides that "[m]ultiple transactions by or for any person which in any one day total more than $10,000 should be treated as a single transaction . . . ."

This argument is wholly without merit. The instruction cannot be the basis for criminal liability because the agency failed to promulgate it with the opportunity for notice and comment that the Administrative Procedure Act requires. *See* 5 U.S.C. § 553(b); *United States v. Reinis*, 794 F.2d 506, 508 (9th Cir. 1986); *United States v. Anzalone*, 766 F.2d 676, 679 n. 6 (1st Cir. 1985).

The United States does not, however, contend very strongly that the duty to file a CTR in this case arose by virtue of Form 4789. It relies more heavily on the rationale announced in *United States v. Richter*, 610 F. Supp. 480 (N.D. Ill. 1985), which was also adopted in *United States v. Shearson Lehman Bros., Inc.*, No. 86-00293-01 (E.D. Pa., 12.4.86). *Richter* involved multiple deposits exceeding $10,000 in one day at the same bank by or for the same individual. The court held that defendants caused the bank to fail to file by breaking up a large sum of money into several smaller sums and, "under § 2, it is *these* acts, 'if directly performed by' bank officials which would violate § 5313." *Id.* (quoting 18 U.S.C. § 2) (emphasis in original). The court stated:

> Even if the bank had no duty to file a CTR in the multiple deposit situation, *the crime had already been committed:* the defendants had intentionally structured their transactions to evade the reporting requirements of the Act. The crime was breaking up the deposits to cause the bank to fail to file a CTR where it would have done so had the deposits not been broken up. The relevant duty—the existence of which is not disputed—is the duty of the bank to file CTR's for single deposits of more than $10,000. The defendants allegedly caused the bank not to fulfill *this duty.* The other, later "duty"—whether the bank is required to

> report transactions *already* broken into increments—is irrelevant here. It does not matter whether the defendants caused the bank not to fulfill this possible duty.

Id. at 490 (emphasis in original).

This court is unpersuaded by this logic. As the *Shearson* court correctly noted, "the key inquiry is whether defendants have somehow caused financial institutions to breach a statutory duty to report currency transactions over $10,000." *Shearson*, slip op. at 19. *See also Richter*, 610 F.Supp. at 490. But the exact statutory duty is the duty of the bank to "file a report of each deposit, withdrawal, exchange of currency or other payment or transfer by, through, or to such financial institution, *which involves a transaction in curency of more than $10,000*" (emphasis added). 31 F.C.R. § 103.22. A transaction in currency for purposes of this statute is defined as "[a] transaction involving the *physical transfer* of currency from one person to another" (emphasis added). 31 C.F.R. § 103.11(1). In neither *Shearson* nor *Richter* did a transaction in currency exceeding $10,000 occur. *Shearson* overcomes this difficulty by misusing the term. It characterizes the breaking up of the deposit as the breaking up of a transaction: "[Defendants] caused the bank to violate the law . . . when they broke up their transaction to avoid the $10,000 CTR retirement." *Shearson*, slip op. at 15. But, in this court's view, what defendants broke up was not a transaction, as this was not a physical transfer of currency, but only a potential transaction. When one breaks up a large potential deposit or withdrawal into increments of less than $10,000, no physical transfer exceeding $10,000 occurs, and the bank is under no duty to file. This structuring does not cause the bank to breach a duty to file; it merely prevents the duty from arising.

The Eighth Circuit has recently, moreover, decided a case which casts considerable doubt on the validity in this circuit of the argument advanced by the government here. *United States v. Larson*, No. 85-5288 (8th Cir. July 22, 1986), decided after

Richter, addressed the issue of the duty to report transactions that were structured so that none exceeded $10,000. The *Larson* court reversed defendant's conviction of concealing material facts by intentionally structuring transactions so as to avoid the requirements of the Reporting Act. The basis of this ruling was that defendant had no duty to report such information. The court stated:

> The regulation enacted by the Secretary, 31 C.F.R. § 103.22(a), requires only that the financial institution file a report, and then only if the monetary transaction exceeds $10,000.00. The regulation does not require other participants, such as Larson, to file a report, nor does it require them to inform the bank about other currency transactions they have made.
>
> . . . .
>
> . . . Since criminal laws are strictly construed and any ambiguity is to be resolved in favor of lenity, *United States v. Enmons*, 410 U.S. 396, 411 (1973), we hold that Larson cannot be guilty of concealing material facts unless there was a duty to disclose the facts.

Larson also reversed defendant's conviction under 18 U.S.C. § 2, holding that "he did not aid, abet, or cause the banks to commit a crime." The apparent basis of this ruling was that as each transaction was less than $10,000, the bank had no duty to file and thus could not have committed a crime by not filing. The court thus rejected the rationale that a person who breaks up a large sum of money into transactions not exceeding $10,000 in order to avoid the filing of CTR's has any duty to inform the bank of such transactions or causes the bank to violate the law.

As previously noted, "criminal laws are strictly construed and any ambiguity is to be resolved in favor of lenity." *United States v. Enmons*, 410 U.S. at 411. Evidence that the alleged duty to report structured transactions is

not clear is provided by the recently proposed amendment to 31 C.F.R. § 103.22(a) (1). The new regulation would read:

> Each financial institution other than a casino shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution which involves a transaction in currency of more than $10,000.00. *Multiple currency transactions shall be treated as a single transaction if the financial institution is aware that they are or on behalf of any person and result in either cash in or cash out totalling more than $10,000.00 during any one business day.* Deposits made at night or over a weekend or holiday shall be treated as if received on the next business day following the deposit. (Emphasis added.)

> A 1980 report to Congress by the Comptroller General regarding the Bank Secrecy Act stated, moreover, that:

> Treasury's regulations implementing the act were neither thorough nor precise. . . . The regulations were silent on the propriety of a customer's conducting multiple transactions to avoid reporting.

Thus it seems that the government has conceded that the duty to report transactions such as those at issue here is at best uncertain.

The court therefore concludes on the basis of the foregoing that the bank was under no obligation to file CTR's for any of the transactions noted in the indictment.

Thus Counts 2 and 3 fail to state an offense against the laws of the United States. [4]

II.

Counts 4 and 5, which allege that defendant concealed material facts, or caused them to be concealed, by designing transactions to mislead banks into believing they had no duty to report the transactions to the government, in violation of 18 U.S.C. §§ 1005 [5] and 2, are similarly dependent on the existence of a duty to report. *See Larson*, slip op. at 4. If the law imposes no duty on banks to file, defendant cannot be charged with concealment because without this duty the facts allegedly concealed are not material. Even if the bank had known that defendant was

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A case factually similar to the one at bar, in that the defendant was a bank officer rather than a customer, is *United States v. Thomson*, 603 F.2d 1200 (5th Cir. 1979). Thompson, a bank chairman, made a $45,000 loan to a bank customer. To avoid the filing requirement of the Bank Secrecy Act, Thompson had five $9,000 notes prepared. The chairman obtained $45,000 in cash from the loan notes, bundled the cash in $9,000 increments and physically transferred the entire sum to the customer. No CTR was filed. For these reasons, Thompson was convicted of violating 31 U.S.C. § 1081, the predecessor of § 5313. The United States, citing *Thompson*, strongly urges that the same result be reached in the instant case.

Thompson, is, however, easily distinguished from the case at bar since it involved an actual single physical transfer in currency exceeding $10,000. Thompson merely attempted to disguise this transfer by separating the $45,000 into $9,000 bundles. In our case, no single physical transfer in currency actually exceeded $10,000.

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18 U.S.C. § 1001 provides:

Whoever, in any manner within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

structuring the transactions in this manner, it still would not have had to file CTR's for them. *See Shearson*, slip op. at 9. The government recognizes the necessary tie between the finding of a § 5313 reporting violation and a § 1001 concealment violation, since it charges a § 1001 violation only for the two days it claims the bank had a duty to report.

Finally, Count 1, which charges that defendant conspired to defraud the government by impeding the collection of data required in the CTR's, in violation of 18 U.S.C. § 371, [6] also depends upon the existence of a duty to file. Since none of the alleged transactions constituted data that the government required to be reported, defendant cannot be said to have conspired to defraud the United States. *See Shearson*, slip op. at 9.

III.

For these reasons all the charges against defendant Chris Polychron in this case will be dismissed.

Feb. 18, 1987
DATE

/s/ Morris S. Arnold
HON. MORRIS S. ARNOLD
UNITED STATES DISTRICT JUDGE

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[6] 18 U.S.C. § 371 provides:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do not act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

APPENDIX B

United States Court of Appeals
For the Eighth Circuit

No. 87-1371

United States of America,	*
	*
Appellant,	*
	*
v.	* Appeal from the United
	* States District Court for
Chris Polychron,	* Western District of
	* Arkansas.
Appellee.	*

Submitted: October 14, 1987

Filed: March 8, 1988

Before FAGG, Circuit Judge, and BRIGHT and ROSS, Senior Circuit Judges.

ROSS, Senior Circuit Judge.

I.

This is a government appeal from an order of the district court dismissing an indictment before trial. The indictment charged Chris Polychron (appellee), President of the Grand National Bank of Hot Springs, Arkansas, with two counts of failing to file currency transaction reports (CTRs) or causing them not to be filed, 31 U.S.C. §§ 5313 and 5322 and 18 U.S.C. § 2, with concealing material facts from the Department of the

Treasury in regard to those transactions, 18 U.S.C. § 1001, and with conspiring to violate the currency transaction reporting statute and regulations which require the filing of such reports, 18 U.S.C. § 371. On appeal, the government argues that the district court erred in concluding that the indictment against Polychron failed to state a prosecutable offense. The government asserts that the indictment charging a bank president with intentionally structuring transactions in order to avoid the statutory filing requirements sufficiently alleges facts which constitute a crime against the United States. We agree with the government and accordingly reverse the decision of the district court.

II.

On appeal, Polychron argues that the Reporting Act and its implementing regulations do not provide fair warning that a violation occurs when a bank president structures currency transactions in order to circumvent the reporting laws. He argues that because the regulations neither specifically prohibit the structuring of currency transactions, nor require a CTR to be filed for multiple same-day transactions which in aggregate exceed $10,000, the charges alleged in the indictment fail to state a prosecutable offense.

In order to be valid, an indictment must allege that the defendant performed acts which, if proven, constitute the violation of law for which he is charged. If the acts alleged in the indictment do not constitute a violation of law, the indictment is properly dismissed.

The indictment in the instant case charges that on or about May 29, 1979, unindicted co-conspirator William R. Anderson opened an account at the Grand National Bank under the name of "William Spaniol." In February, 1982, Anderson deposited proceeds from the maturation of certificates of deposit in the Spaniol account in an amount in excess of $140,000. The indictment alleges that Anderson instructed Chris Polychron, President of the Grand National Bank, to withdraw the

$140,000 in cash withdrawals of less than $10,000 each until the account was depleted and provided Polychron with signed withdrawal slips for that purpose. Subsequently, at Anderson's instructions, between February 9, 1982 and March 12, 1982, Polychron withdrew or caused the withdrawal of the $140,000 from the Spaniol account in fifteen transactions of less than $10,000 each. [1] On both March 9, 1982 and March 11, 1982, Polychron made two withdrawals each, all withdrawals individually under $10,000 but in aggregate amounting to $19,100 and $16,737 for the two respective days. No CTRs were filed for these transactions. Polychron was subsequently charged with violating CTR reporting laws under 18 U.S.C. §§ 2 [2] and 1001 [3] as to the March 9 and March 11 withdrawals only.

On February 19, 1987, the district court granted a motion to dismiss the indictment against Polychron holding that the bank had no duty to report the March 9 and March 11 transactions because the statute and implementing regulations of the Currency and Foreign Transaction Reporting Act applied only to individual transfers of currency in excess of $10,000 and did not require aggregation of individual same-day transactions. The government now appeals the dismissal of the indictment.

III.

The Currency and Foreign Transaction Reporting Act, 31 U.S.C. §§ 5311-24 (1982 & Supp. II 1984, Supp. III. 1985) (Reporting Act) provides that "[w]hen a domestic financial institution is involved in a [currency] transaction * * * under circumstances the Secretary [of Treasury] prescribes by regulation, the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes." 31 U.S.C. § 5313(a). Although the Secretary of the Treasury is clearly authorized under § 5313 to impose filing

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1 The following withdrawals were made:

DATE OF WITHDRAWAL	AMOUNT WITHDRAWN
February 9, 1982	$ 9,100
February 11, 1982	9,450
February 16, 1982	8,500
February 17, 1982	9,700
February 18, 1982	9,800
February 19, 1982	9,200
February 25, 1982	9,800
February 26, 1982	9,900
March 5, 1982	9,500
March 9, 1982	9,400
March 9, 1982	9,700
March 10, 1982	9,900
March 11, 1982	6,837
March 11, 1982	9,900
March 12, 1982	9,900
TOTAL	$140,587

2
18 U.S.C. § 2 provides:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

3
18 U.S.C. § 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

requirements on both private individuals and financial institutions, the Secretary has required only that financial institutions file currency reports when they participate in "a transaction in currency of more than $10,000." 31 C.F.R. § 103.22(a).[4] A "transaction in currency" is defined under 31 C.F.R. § 103.11(o), as "[a] transaction involving the physical transfer of currency from one person to another." For the purpose of filing the currency transaction reports, the Department of Treasury issued Form 4789 which stated that "[m]ultiple transactions by or for any person which in any one day total more than $10,000 should be treated as a single transaction, if the financial institution is aware of them." U.S. Dept. of Treasury, Form 4789 (1982).

Several circuits have examined at great length the extent to which the Reporting Act imposes criminal liability for the structuring of currency transactions in avoidance of the statutory filing requirements. The courts have focused primarily on the question of whether a bank customer, as opposed to a bank officer, can be criminally liable under the provisions of the Act for causing a bank to fail to file a CTR by not disclosing the structured nature of currency transactions.

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4 Subsequent to the indictment at issue here, the regulations promulgated pursuant to the statute have been amended to require the filing of CTRs by financial institutions for multiple, same-day currency transactions which in aggregate exceed $10,000. 31 C.F.R. § 103.22(a)(1) (1987). The new regulation reads:

> (a)(1) Each financial institution other than a casino shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution which involves a transaction in currency of more than $10,000. Multiple currency transactions shall be treated as a single transaction if the financial institution has knowledge that they are by or on behalf of any person and result in either cash in or cash out totalling more than $10,000 during any one business day. Deposits made at night or over a weekend or holiday shall be treated as if received on the next business day following the deposit.

One line of cases has adopted a "substance-over-form" approach in dealing with a bank customer's scheme to circumvent the filing requirements. *See e.g., United States v. Hayes*, 827 F.2d 469, 472 (9th Cir. 1987); *United States v. Bank of New England*, 821 F.2d 844, 848-49 (1st Cir.), *cert. denied*, 108 S.Ct. 328 (1987); *United States v. Cure*, 804 F.2d 625, 629 (11th Cir. 1986) (per curiam); *United States v. Giancola*, 783 F.2d 1549, 1552-53 (11th Cir. 1986), *cert. denied*, 107 S.Ct. 669 (1987); *United States v. Thompson*, 603 F.2d 1200, 1203 (5th Cir. 1979). In these cases, the courts have reasoned that the customers' structured transactions were in reality the division of one large transaction into several smaller transactions. Where these smaller, multiple transactions have occurred at the same bank, on the same day, the courts have had no difficulty categorizing them as a single transaction in excess of $10,000.

In contrast, a minority of circuits, [5] including our own, has adopted the position that because neither the Act nor the regulations impose a duty on bank customers to disclose the structured nature of their transactions, there can be neither a substantive violation of the Act nor a violation of §§ 2(b) or 1001 by a bank customer. *See, United States v. Gimbel*, 830 F.2d 621, 625-26 (7th Cir. 1987); *United States v. Larson*, 796 F.2d 244, 246 (8th Cir. 1986); *United States v. Varbel*, 780 F.2d 758, 762 (9th Cir. 1986).

We distinguish this line of cases, and in particular our own decision in *United States v. Larson*, *supra*, from the case presently before us. In *Larson*, this court reversed the

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One circuit which had previously adhered to the position that bank customers could not be liable for structuring currency transactions in avoidance of the Reporting Act, has recently imposed liability on a bank customer for making several individual transactions during the same visit to the bank. *Compare United States v. Anzalone*, 766 F.2d 676, 681 (1st Cir. (1985) (bank customer not liable for structuring multiple currency transactions) *with United States v. Bank of New England*, 821 F.2d 844, 848-49 (1st Cir.), *cert. denied*, 108 S.Ct. 328 (1987) (customer liable for dividing large transaction into smaller, multiple transactions.)

defendant bank customer's conviction for concealing material facts under 18 U.S.C. § 1001 and held that the Reporting Act imposes no duty on a bank customer to disclose to the bank or the Internal Revenue Service the structured nature of his transactions. *United States v. Larson, supra*, 796 F.2d at 246-47. The court also held that a bank customer could not be held criminally responsible for aiding and abetting the bank's failure to file CTRs under 18 U.S.C. § 2 because "[i]f the banks were unaware that [the customer] was structuring his transactions, [the banks] committed no offense by failing to file CTRs." *Id.* at 247.

Larson is distinguishable from the present case. Here, the defendant charged with violating the reporting laws is the president of the bank at which the currrency transactions were made, in sharp contrast to a bank customer acting without the bank's knowledge. It is axiomatic that in our case the bank was alleged to be aware of the statutory duty to report as well as the deliberate efforts to evade that duty.

Several circuits have noted the significant distinction between a customer structuring transactions without the bank's knowledge and the bank itself structuring the currency transactions. In *United States v. Nersesian*, 824 F.2d 1294, 1312 (2d Cir.), *cert. denied*, 108 S.Ct. 357 (1987), the court observed that "[h]ad the bank intentionally structured the transactions as [the customer] did, splitting up large sums into blocks of less than $10,000 in order to avoid the filing of a CTR, it surely would have violated the Act as well as been guilty of concealing a material fact in violation of § 1001." *Accord United States v. Hayes*, 827 F.2d 469, 472 (9th Cir. 1987) (critical to court's imposition of criminal sanction on the defendant bank customer was the fact that the bank vice president assisted the defendant in structuring the currency transaction); *United States v. Heyman*, 794 F.2d 788, 791 (2d Cir.), *cert. denied*, 107 S.Ct. 585 (1986) (had "a financial institution, structured the transaction as [the customer] did, it would have violated

federal law"); *United States v. Thompson*, *supra*, 603 F.2d 1200 (5th Cir. 1979) (bank chairman's knowing division of single large-sum transactions into smaller transactions violated the reporting requirements); *United States v. Richter*, 610 F.Supp. 480, 489 n. 16 (N.D.Ill. 1985) (bank officer who structures transactions "would surely violate the Act for failing to file a CTR").

Finally, in a recent decision, *United States v. Shannon*, No. 87-1158 (8th Cir. Jan. 12, 1988), this court affirmed the conviction of the chairman of a bank charged with failing to file a required CTR on a cash transaction exceeding $10,000. Although this case is distinguishable from the one before us in that the defendant in *Shannon* did not structure his transactions, the reasoning used by the court in affirming the conviction is relevant to our analysis here. In imposing criminal liability on the bank officer, the court stated, "[i]n light of Shannon's position of control at [the bank], to decide otherwise would thwart the purpose of the reporting statutes." *Id.* at 4.

We find this reasoning equally significant in the case before us. Polychron's alleged complicity in structuring the withdrawal of currency from an account bearing a false name in an effort to avoid the reporting requirement is enough to differentiate this case from *Larson*, *supra*, and others dealing with the criminal liability of bank customers who structure currency transactions. By structuring the withdrawals from the Spaniol account, as alleged in the indictment, so that no single transaction involved an amount greater than $10,000, Polychron willfully caused the Grand National Bank to fail to file the appropriate CTRs.

Accordingly, we hold that the Reporting Act sufficiently apprised Polychron that when a financial institution or its officer or employee acting within the scope of his employment structures an otherwise reportable transaction into multiple transactions in a single day that do not individually exceed $10,000, the bank or its officer or

employee may be held criminally responsible for failing to file, or causing the bank to fail to file, a CTR. To hold contrary would be to eviscerate the intent of Congress and the meaning of the Reporting Act.

Therefore, we conclude that the district court erred in dismissing the indictment against Polychron. The judgment of the district court is reversed and the cause is remanded for further proceedings consistent with this opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX C

United States Court of Appeals
For the Eighth Circuit

No. 87-1371WA

United States of America,	*	
	*	
Appellant,	*	
	*	
vs.	*	Appeal from the United
	*	States District Court for
Chris Polychron,	*	Western District of
	*	Arkansas.
Appellee.	*	

Appellee's petition for rehearing en banc has been considered by the Court and is denied.

Judges Donald P. Lay, Gerald W. Heaney and Theodore McMillian would have granted the petitions. Judge Richard S. Arnold took no part in the consideration or decision of the petitions.

Petition for rehearing by the panel was also denied.

May 20, 1988

Order entered at the Direction of the Court:

/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
HOT SPRINGS DIVISION

UNITED STATES OF AMERICA	)
vs.	) Criminal No. 86-60016-01
CHRIS POLYCHRON	) 18 U.S.C. 371) 31 U.S.C. 5313 (formerly 1081) & 5322 18 U.S.C. 1001 18 U.S.C. 2

INDICTMENT

The Grand Jury charges:

COUNT I

A. *INTRODUCTION:*

1. At all times material herein, "Grand National Bank of Hot Springs" was organized to carry on the business of banking under the laws of the United States and, as such, was a "financial institution" as defined by Title 31, United States Code, Section 5312(a) (2).

2. At all times material herein defendant CHRIS POLYCHRON was President of the Grand National Bank of Hot Springs, Arkansas.

3. At all times material to this indictment:

a. Transactions in currency are defined as transactions involving the physical transfer of currency from

one person to another, as defined in Title 31, Code of Federal Regulations, Section 103.11.

b. Financial institutions are required to file a report for each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which is a transaction in currency of more than $10,000.00, as required by Title 31, United States Code, Section 5313 (formerly Section 1081) and Title 31, Code of Federal Regulations, Section 103.22(a).

c. Currency Transaction Reports are filed with the Internal Revenue Service (IRS) on the form prescribed, that is, IRS Form 4789, which requires, among other items, the identity of the individual who conducted the transaction with the financial institution and the individual or organization for whom the transaction was completed.

d. Currency transaction reports as previously described herein are required to be made for use in criminal, tax, and regulatory investigations and proceedings.

4. At all times material herein, William R. Anderson, a/k/a William Spaniol, was a customer of Grand National Bank of Hot Springs, Arkansas.

CHARGE

1. That from a date unknown to this Grand Jury but on or about May, 1979 until on or about March, 1982, in the Western District of Arkansas, Hot Springs Division, the defendant CHRIS POLYCHRON, and unindicted co-conspirator, William R. Anderson, a/k/a William Spaniol, did unlawfully, willingly and knowingly conspire, combine, confederate and agree together and with each other to defraud the United States, and the Department of Treasury, Internal Revenue Service, an agency of the United States, by impairing, obstructing and defeating its lawful governmental functions of the collection of data and reports of currency transactions in

excess of ten thousand dollars ($10,000) for use in criminal, tax and regulatory investigations.

MANNER AND MEANS

2. Among the means by which the defendant CHRIS POLYCHRON and unindicted co-conspirator William R. Anderson, a/k/a William Spaniol, would and did employ to effectuate and carry out said conspiracy were the following:

a. From an unknown date but on or about May, 1979 and continuing thereafter up to on or about March 12, 1982, the defendant, CHRIS POLYCHRON, acting in his capacity as President of Grand National Bank, Hot Springs, Arkansas, possessed, received or accumulated quantities of United States currency in excess of ten thousand dollars ($10,000) from William R. Anderson, a/k/a William Spaniol;

b. From an unknown date but on or about May, 1979 and continuing thereafter to on or about July, 1980, the defendant, CHRIS POLYCHRON, caused the aforesaid currency to be deposited into an account or accounts under the name of "William Spaniol" at the Grand National Bank, Hot Springs, Arkansas;

c. From on or about February 9, 1982 and continuing on a regular basis up to on or about March 12, 1982, the defendant, CHRIS POLYCHRON, withdrew or caused the withdrawal of United States currency in increments of less than $10,000 from the account in the name of "William Spaniol" and thereafter delivered or caused to be delivered to William R. Anderson; thus causing no accurate currency transaction report to be filed with the Secretary of the Department of Treasury as required by law.

OVERT ACTS

(1) From on or about May, 1979 to March, 1982, the defendant, CHRIS POLYCHRON, assisted William R.

Anderson, a/k/a William Spaniol, with various banking transactions at Grand National Bank.

(2) On or about May 29, 1979, William R. Anderson opened or caused to be opened an account at Grand National Bank under the name of "William Spaniol".

(3) On or about February, 1982, William R. Anderson, a/k/a William Spaniol, deposited or caused to be deposited proceeds from the maturation of a Certificate of Deposit in the name of "William Spaniol" into said account in an amount in excess of $140,000.00.

(4) William R. Anderson a/k/a William Spaniol, instructed Chris Polychron to withdraw said sum in excess of $140,000.00 from his savings account.

(5) William R. Anderson a/k/a William Spaniol provided Chris Polychron with signed withdrawal slips in order for the sum in excess of $140,000.00 to be withdrawn from the William Spaniol savings account.

(6) That on or about February, 1982, the defendant, CHRIS POLYCHRON, instructed employees at the Grand National Bank, Hot Springs, Arkansas, to withdraw United States currency from said William Spaniol savings account in amounts of less than $10,000.00 until the account was depleted.

(7) That in accordance with defendant CHRIS POLYCHRON's instructions United States currency was withdrawn from said savings account as follows:

February 9, 1982	$ 9,100
February 11, 1982	9,450
February 16, 1982	8,500
February 17, 1982	9,700

February 18, 1982	9,800
February 19, 1982	9,200
February 25, 1982	9,800
February 26, 1982	9,900
March 5, 1982	9,500
March 9, 1982	9,400
March 9, 1982	9,700
March 10, 1982	9,900
March 11, 1982	6,837
March 11, 1982	9,900
March 12, 1982	9,900
TOTAL	$140,587

(8) That Currency Transaction Reports of these cash withdrawals were not made. All in violation of Title 18, United States Code, Section 371.

COUNT 2

On or about March 9, 1982, in the Western District of Arkansas, Hot Springs Division, the defendant, CHRIS POLYCHRON, while President of Grand National Bank, Hot Springs, Arkansas, knowingly and willfully failed to file, or caused the failure to file with the Internal Revenue Service, a Currency Transaction Report, IRS Form 4789, in connection with the withdrawal at Grand National Bank, Hot Springs, Arkansas, of United States currency in excess of ten thousand dollars ($10,000), that is, nineteen thousand one hundred dollars ($19,100) in United States currency, which offense was committed as part of a pattern of illegal activity involving transactions exceeding one hundred thousand dollars ($100,000) in a twelve month period, that is, a pattern of transactions between February, 1982 and March, 1982 totalling in excess of one hundred forty thousand dollars ($140,000), in violation of Title 31, United States Code, Section 5313 and 5322 and Title 18, United States Code, Section 2.

COUNT 3

On or about March 11, 1982, in the Western District of Arkansas, Hot Springs Division, the defendant CHRIS POLYCHRON while President of Grand National Bank, Hot Springs Arkansas, knowingly and willfully failed to file, or caused the failure to file with the Internal Revenue Service, a Currency Transaction Report, IRS Form 4789, in connection with the withdrawal at Grand National Bank, Hot Springs, Arkansas, of United States currency in excess of ten thousand dollars ($10,000), that is, sixteen thousand seven hundred thirty seven dollars ($16,737) in United States currency, which offense was committed as part of a pattern of illegal activity involving transactions exceeding one hundred thousand dollars ($100,000) in a twelve month period, that is, a pattern of transactions between February, 1982 and March, 1982 totalling in excess of one hundred forty thousand dollars ($140,000), in violation of Title 31, United States Code, Section 5313 and 5322 and Title 18, United States Code, Section 2.

COUNT 4

On or about March 9, 1982 in the Western District of Arkansas, Hot Springs Division, the defendant, CHRIS POLYCHRON, in his capacity as President of Grand National Bank, Hot Springs, Arkansas, knowingly and willfully did conceal or cover-up or caused to be concealed or covered-up by a scheme, trick or device material facts in a matter within the jurisdiction of the Department of Treasury, Internal Revenue Service, which facts were required to be reported pursuant to Title 31, United States Code, Section 5313, 5322 and 31 Code of Federal Regulations, Sections 103.21, 103.22 and 103.25.

It was the object of said scheme, trick or device for the defendant, CHRIS POLYCHRON, in his capacity as President of Grand National Bank, Hot Springs, Arkansas, to withdraw or cause to be withdrawn United States

currency in an amount in excess of $10,000.00 to-wit, $19,100.00 from the William Spaniol account at Grand National Bank in Hot Springs, Arkansas, thereby causing no Currency Transaction Reports (IRS Form 4789) concerning said currency to be filed with the Internal Revenue Service; and, thereby concealing or covering-up material facts in a matter, that is, the accurate existence, source, origin and transfer of the said United States currency.

All in violation of Title 18, United States Code, Section 1001 and 2.

COUNT 5

On or about March 11, 1982 in the Western District of Arkansas, Hot Springs Division, the defendant, CHRIS POLYCHRON, in his capacity as President of Grand National Bank, Hot Springs, Arkansas, knowingly and willfully did conceal or cover-up or caused to be concealed or covered-up by a scheme, trick or device material facts in a matter within the jurisdiction of the Department of Treasury, Internal Revenue Service, which facts were required to be reported pursuant to Title 31, United States Code, Section 5313, 5322 and 31 Code of Federal Regulations, Sections 103.21, 103.22 and 103.25.

It was the object of said scheme, trick or device for the defendant, CHRIS POLYCHRON, in his capacity as President of Grand National Bank, Hot Springs, Arkansas, to withdraw or cause to be withdrawn United States currency in an amount in excess of $10,000.00 to-wit, $16,737.00 from the William Spaniol account at Grand National Bank in Hot Springs, Arkansas, thereby causing no Currency Transaction Reports (IRS Form 4789) concerning said currency to be filed with the Internal Revenue Service; and, thereby concealing or covering-up material facts in a matter, that is, the accurate existence, source, origin and transfer of the said United States currency.

All in violation of Title 18, United States Code, Section 1001 and 2.

A True Bill

_____
Foreperson

J. Michael Fitzhugh
United States Attorney
P.O. Box 1524
Fort Smith, AR 72902
Tele. (501) 783-5125

Form **4789**
(Rev. Sept. 1980)
Department of the Treasury
Internal Revenue Service

Currency Transactio.. Report

File a separate report for each transaction
(Complete all applicable parts—see instructions)

Part I Identity of individual who conducted this transaction with the financial institution

Name (Last)	First	Middle Initial	Social Security Number
Number and Street			Business, occupation, or profession
City	State	ZIP code	Country (If not U.S.)

Method of verifying identification:

☐ Driver's permit ..... (State) ..... (Number)
☐ Passport ..... (Country) ..... (Number)
☐ Alien ID card ..... (Country) ..... (Number)
☐ Other (specify) .....

Part II Individual or organization for whom this transaction was completed (Complete only if different from Part I)

Name	Identifying number
Number and Street	Business, occupation, or profession
City / State / ZIP code / Country (If not U.S.)	

Part III Customer's account number

☐ Savings account ..... (Number)
☐ Checking account ..... (Number)
☐ Share account ..... (Number)
☐ Loan account ..... (Number)
☐ Safety deposit box ..... (Number)
☐ Other (specify) .....

Part IV Description of transaction. If more space is needed, attach a separate schedule and check this box ☐

1. Nature of transaction (check the applicable boxes)

☐ Deposit
☐ Withdrawal
☐ Check Cashed
☐ Check Purchased
See item 6
☐ Currency Exchange
☐ Mail/Night Deposit
☐ Other (specify)

2. Total amount of currency transaction (in U.S. dollars)	3. Amount in denominations of $100 or higher	4. Date of transaction (Month, day, and year)

5. If other than U.S. currency is involved, please furnish the following information:

Currency name	Country	Total amount of each foreign currency (in U.S. dollars)

6. If a check was involved in this transaction, please furnish the following information (See Instructions):

Date of check	Amount of check (in U.S. dollars)	Payee
Drawer of check		Drawee bank and City

Part V Financial institution reporting the financial transaction

Name and Address	Identifying number (EIN or SSN)
	Business activity

Sign here ▶ ..... (Authorized Signature) ..... (Title) ..... (Date)

Type or print name of authorized signer ▶

General Instructions (Each applicable item must be completed.)

Who Must File.—Each financial institution must file a Form 4789 for each deposit, withdrawal, exchange of currency, or other payment or transfer, by, through, or to that financial institution, which involves a transaction in currency of more than $10,000. Multiple transactions by or for any person which in any one day total more than $10,000 should be treated as a single transaction, if the financial institution is aware of them.

Exceptions.—Banks do not have to file Form 4789 for transactions with Federal Reserve Banks, Federal Home Loan Banks, or other domestic banks.

Banks do not have to file Form 4789 for the following transactions if the amounts involved are reasonable and customary in the course of the customer's business or activities:

(1) deposits or withdrawals of currency from an existing account by an established depositor who is a U.S. resident and who—
   (a) operates a retail business in the United States (except automobile, boat, or airplane dealerships), or
   (b) operates a sports arena, race track, amusement park, bar, restaurant, hotel, licensed check cashing service, vending machine company, or theater;

(2) deposits or withdrawals, exchanges of currency, or other payments and transfers by local, state, or Federal government agencies;

(3) withdrawals for payroll purposes from an existing account by an established depositor who is a U.S. resident and who operates a firm that regularly withdraws more than $10,000 to pay employees in currency.

Banks must keep a record of customers whose transactions are not reported because of exceptions (1) through (3) above. (See 31 CFR, section 103.22 for details about what to include in this record.)

Nonbank financial institutions do not have to report transactions with commercial banks.

When and Where to File.—File this form by the 15th day after the date of the transaction with the Internal Revenue Service, Ogden, Utah 84201, or hand carry it to your local IRS office. Keep a copy of each Form 4789 for 5 years from the date you file it.

Identifying Number.—For individuals this is the social security number. For others it is the employer identification number.

Identification Required.—Before completing a transaction, a financial institution must verify and record (1) the name and address of the individual presenting the transaction and (2) the identity, account number, and taxpayer identifying number (if any) of the individual or organization for whose account the transaction is being made. Use a passport or other official document showing nationality to verify the identity of an alien or nonresident of the United States. Use a document like a driver's license, etc., normally accepted as a means of identification when cashing checks, to verify the identity of anyone else. In each case, record on this form the method of identification used.

Penalties.—Civil and criminal penalties are provided for failure to file a report or to supply information, and for filing a false or fraudulent report. See 31 CFR, sections 103.47 and 103.49.

Specific Instructions

Part I.—(1) In the address section, enter the permanent street address of the individual conducting the transaction.
(2) In the social security block, enter the social security number of the individual conducting the transaction. If the individual has no number, write "None" in this block.
(3) Check the appropriate box and enter the number of the document used to verify the identity of the individual conducting the transaction.

Part II.—(1) For individuals, enter last name, first name, and middle initial, if any, in the name block in that order. For all others, enter the complete organization name.
(2) In the identifying number block, enter the social security number or employer identification number.

Part III.—Check the appropriate box and enter the appropriate customer's account number.

Part IV, line 6.—Complete this line if a check is cashed or a bank check is purchased with currency.

Part V.—Institutions may also enter in the name and address block other identifying information.

Signature.—This report must be signed by an authorized individual. Also type or print the name of the authorized signer.

Definitions

Bank.—Each agent, agency, branch, or office in the United States of a foreign bank and each agency, branch, or office in the United States of any person doing business in one or more of the capacities listed below:

(1) a commercial bank or trust company organized under the laws of any state or of the United States;
(2) a private bank;
(3) a savings and loan association or a building and loan association organized under the laws of any state or of the United States;
(4) an insured institution as defined in section 401 of the National Housing Act;
(5) a savings bank, industrial bank, or other thrift institution;
(6) a credit union organized under the laws of any state or of the United States; and
(7) any other organization chartered under the banking laws of any state and subject to the supervision of the bank supervisory authorities of a state.

Currency.—The coin and currency of the United States or of any other country, which circulate in and are customarily used and accepted as money in the country in which issued. It includes United States silver certificates, United States notes, and Federal Reserve notes, but does not include bank checks or other negotiable instruments not customarily accepted as money.

Financial Institution.—Each agency, branch, or office in the United States of any person doing business in one or more of the capacities listed below:

(1) a bank;
(2) a broker or dealer in securities, registered or required to be registered with SEC under the Securities Exchange Act of 1934;
(3) a person who engages as a business in dealing in or exchanging currency (for example, a dealer in foreign exchange or a person engaged primarily in the cashing of checks);
(4) a person who engages as a business in issuing, selling, or redeeming travelers' checks, money orders, or similar instruments, except one who does so as a selling agent exclusively, or as an incidental part of another business;
(5) a licensed transmitter of funds, or other person engaged in the business of transmitting funds abroad for others.

Person.—An individual, corporation, partnership, trust or estate, joint stock company, association, syndicate, joint venture, or other unincorporated organization or group, and all entities treated as legal personalities.

Transaction in Currency.—A transaction involving the physical transfer of currency from one person to another. A transaction in currency does not include a transfer of funds by means of bank check, bank draft, wire transfer, or other written order that does not include the physical transfer of currency.

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(2)

No. 88-100

In the Supreme Court of the United States

OCTOBER TERM, 1988

CHRIS POLYCHRON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals erred in reversing an order dismissing an indictment for failure to state a federal offense.

Petitioner, the president of a bank, was indicted by a grand jury sitting in the Western District of Arkansas. The indictment charged him with two counts of failing to file currency transaction reports (CTRs), in violation of 31 U.S.C. 5313 and 5322; two counts of concealing material facts from the Department of the Treasury in regard to those transactions, in violation of 18 U.S.C. 1001; and one count of conspiring to violate the currency transaction reporting statute and regulations, in violation of 18 U.S.C. 371 (Pet. App. D1-D8).

On February 19, 1987, the district court dismissed the indictment. The court noted that by statute and regulation financial institutions are required to report currency transactions that exceed $10,000 in amount. The court con-

cluded that those provisions did not require the aggregation of transactions occurring in the same bank on the same day. The court also concluded that the instruction in the Currency Reporting Form (Form 4789) stating that multiple transactions by any person in any one day should be treated as a single transaction could not serve as the basis for criminal liability. Accordingly, the court held that the indictment did not charge an offense when it alleged that petitioner had failed to report his bank withdrawals on March 9 and March 11, 1982, where each individual withdrawal was under $10,000, but where the withdrawals in the aggregate amounted to more than $10,000 for each of those two days (Pet. App. A1-A9).

The court of appeals reversed. The court ruled that the statute sufficiently apprised petitioner that when a financial institution or its officer or employee acting within the scope of his employment breaks an otherwise reportable transaction into multiple transactions in a single day, each of which does not exceed $10,000, the bank or its officer or employee may be held criminally responsible for failing to file a CTR or causing the bank to fail to file a CTR (Pet. App. B1-B9).

Petitioner contends (Pet. 21-30) that individual currency transactions of less than $10,000 may not be aggregated to support an indictment, even when the transactions occur on the same day at the same bank. He also contends (Pet. 26-30) that the court of appeals improperly relied on the instructions on the Currency Reporting Form to support the indictment. Finally, petitioner contends (Pet. 30-32) that the decision of the court of appeals was contrary to the Ex Post Facto and Due Process Clauses of the Constitution.

Whatever the merits of petitioner's contentions, they are not presently ripe for review by this Court. The court of

appeals' decision places petitioner in precisely the same position he would have occupied if the district court had denied his motion to dismiss. If petitioner is acquitted following a trial on the merits, his contentions will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed on appeal, he will then be able to raise his present contentions before this Court, together with any other claims he may have, in a petition for a writ of certiorari seeking review of a final judgment against him. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

AUGUST 1988

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* Because this case is in an interlocutory posture, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests.

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(3)

No. 88-100

In the Supreme Court of the United States

October Term, 1988

Chris Polychron, ... *Petitioner*

v.

United States of America, *Respondent*

SUPPLEMENTAL BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Dated: August 31, 1988

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AUTHORITY

Rule 22.6. of the Supreme Court Rules provides that a party may file a supplemental brief at any time while a Petition for a Writ of Certiorari is pending, calling attention to new cases not available at the time of the party's last filing.

The Third Circuit Court of Appeals' decision in *United States v. Mastronardo*, 849 F.2d 799 (3rd Cir. 1988) was decided on June 13, 1988. The Eighth Circuit Court of Appeals' decision in *United States v. Polychron*, was filed by the Eighth Circuit on March 8, 1988.

REASONS FOR GRANTING THE WRIT

Question 1A of the issues presented in Petitioner's request for a Writ of Certiorari is whether individual currency transactions less than the amount required to file currency transaction reports may be aggregated during the relevant time period to support a criminal indictment based upon the failure to file such reports.

There is a split of authority in the Circuits on this question.

Although the case involved the conviction of a customer, the Third Circuit's decision in *Mastronardo*, supra, squarely conflicts with the Eighth Circuit's decision in *Polychron*, and follows similar decisions of the First [1] Seventh [2], Ninth [3], and Eleventh [4] Circuits.

Interestingly, the Third Circuit in *Mastronardo* predicted that the Eighth Circuit would overturn a conviction where more than $10,000.00 was exchanged at a single bank branch and the Government sought to aggregate those separate transactions. 849 F.2d 804.

Finally, the Court in *Mastronardo* pointed out that criminal liability cannot be imposed against persons for

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1
United States v. Anzalone, 766 F.2d 676 (1st Cir. 1985).

2
United States v. Gimble, 830 F.2d 621 (7th Cir. 1987). (While the Third Circuit cited the District Court Opinion in *United States v. Risk*, 672 F.Supp. 346, 350-58 (S.D. Ind. 1987), the Seventh Circuit subsequently followed *Gimble* in *United States v. Risk*, 843 F.2d 1059 (7th Cir. 1988)).

3
United States v. Varbel, 780 F.2d 758 (9th Cir. 1986).

4
United States v. Denemark, 779 F.2d 1559 (11th Cir. 1986).

structuring currency transactions to avoid inducing financial institutions to file CTRs where the applicable statutes and regulations did not proscribe such acts. The Third Circuit joined those Circuits which have held that such convictions did not pass constitutional muster since the statutes and regulations failed to give fair warning that such conduct was proscribed.

Moreover, the Third Circuit reasoned that whether structuring tranactions frustrated the intent of Congress was irrelevant because frustrating the intent of Congress was not a criminal offense. 849 F.2d 805.

CONCLUSION

For the reasons originally stated and the authority cited in this supplemental brief, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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